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CASES CITED AND DISCUSSED.

OTHER AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 104.

IRENE HAND CORRIGAN AND HELEN CURTIS, *Appellants*,

against

JOHN J. BUCKLEY, *Appellee*.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The statement of the case, of the questions involved, and of the manner in which they are raised, as set out in the brief of the appellants, being conceived by the appellee to be inadequate and not sufficiently full and complete to present the issues, the following statement is submitted.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (Rec., p. 25) affirming a final decree of the Supreme Court of the District of Columbia (Rec., p. 18) whereby the appellant Corrigan was "permanently enjoined for and during the period of 21 years from and after the 1st day of June, 1921", from selling or conveying to the appellant Curtis a certain parcel of land

in the City of Washington, known as Lot 20, Square 152, improved by dwelling house 1727 "S" Street, N. W.; and permanently enjoining the appellant Curtis during the same period of time "from taking title directly or indirectly from the defendant Corrigan to the hereinabove described land and premises and from using or occupying the same and from selling, conveying, leasing, renting, or giving the same to, or permitting the same to be used or occupied by, any negro or negroes, or persons of the negro race or blood" (Rec., pp. 18-19).

The Bill of Complaint.

November 16, 1922, the appellee filed in the court below his bill of complaint for injunction to prevent the appellant Corrigan from conveying to the appellant Curtis, and to prevent the latter from taking title to or occupying, certain real estate in the city of Washington, in violation of a covenant, and thereby to compel specific performance of the negative covenant (Rec., pp. 1-6).

The bill alleged that the appellee is the owner of an undivided interest in lot 74, square 152, improved by dwelling house 1719 S Street, Northwest, Washington, D. C.; and that the appellant Corrigan is the owner of lot 20, square 152, improved by dwelling house 1727 S Street, Northwest. That on June 1, 1921, the appellee, as one of the owners of the first described premises, and the appellant Corrigan, as the owner of the second described premises, together with twenty-eight other persons who were the owners, severally, of twenty-three other parcels of land improved by dwelling houses adjacent and contiguous to and in the same immediate neighborhood of the two parcels above described, all improved by dwelling houses, being in squares 152 and 153 and situated on the north and south sides of S Street between New Hampshire Avenue and Eighteenth Street, Northwest, mutually executed, acknowledged and delivered a covenant, and duly recorded the same in the office of the

Recorder of Deeds of the District of Columbia on August 20, 1921; that all the persons who executed the covenant are white persons, a large number of whom resided and made their homes, and continue to reside and make their homes in said premises, respectively (Rec., pp. 1-3).

THE COVENANT IN ISSUE.

The indenture or covenant is attached to and made a part of the bill and is as follows (Rec., p. 6):

> "This indenture made this first day of June, A. D. 1921, by and between the undersigned, all being residents of the City of Washington, District of Columbia, and owners of real estate situate therein, witnesseth that:
>
> "Whereas the said parties hereto are all owners of real estate situate in the District of Columbia, and located on S Street, between New Hampshire Avenue and 18th Street, Northwest, both on the north side and south side of said street, said property being parts of Squares 152 and 153 as recorded in the Surveyor's Office of the District of Columbia, and
>
> "Whereas the said parties hereto desire, for their mutual benefit, as well as for the best interests of the said community and neighborhood, to improve and in any legitimate way further the interests of said community.
>
> "Now therefore, in consideration of the premises and the sum of Five Dollars ($5.00) each to the other in hand paid, the parties hereto do hereby mutually covenant, promise and agree each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more detailed description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented, or given, to Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective heirs and assigns of the parties hereto for the period of twenty-one (21) years from and after the date of these presents."

The appellee further alleged that on September 26, 1922, the appellant Corrigan entered into a sales contract with the appellant Curtis to sell to the latter the lot and house then and theretofore belonging to the former and included within the covenant. That appellant Curtis is a person of negro race and blood and at and before the making of the contract of sale had knowledge of the existence and terms of the covenant; and that in executing the contract of sale, appellant Corrigan had promised to perform acts in violation of the terms and conditions of the covenant (Rec., pp. 3-4).

The appellee further alleged that at first the appellant Corrigan stated that she had been tricked and defrauded into signing the sales contract, having been made to believe that the appellant Curtis was not a negress but a white person, and that appellant Corrigan had demanded cancellation of the contract of sale on the ground of fraud and misrepresentation; that the appellant Curtis had tendered to the appellant Corrigan the purchase price provided in the contract of sale which appellant Corrigan had refused to accept; but that subsequently appellant Corrigan had threatened to carry out the contract of sale unless other property owners, parties to the covenant, would buy her property and indemnify her against loss (Rec., pp. 4-5).

Finally the appellee averred that if the threats are carried out and the appellant Corrigan conveys her property to appellant Curtis, irreparable injury will be done to the appellee and to the other persons who are parties to the aforesaid Indenture or Covenant; that appellee has no plain, adequate and complete remedy at law; and that he is entitled to specific performance on the part of the appellant Corrigan of her said agreements and covenants and to have the terms and provisions of said Indenture or Covenant specifically enforced in equity by means of an injunction preventing both the appellants from carrying into effect the contract of sale (Rec., p. 5).

Relief Prayed.

The appellee prayed that the appellant Corrigan be permanently enjoined for twenty-one years from the date of the covenant from carrying out the contract of sale with the appellant Curtis and that the appellant Curtis be permanently enjoined during the same period of time from taking title to said land and from occupying same and from selling, conveying, leasing, renting or giving the same to or permitting the same to be used or occupied by any negro (Rec., pp. 5-6).

The contract of sale attached to and made part of the bill appears at page 9 of the record and is in the form of the usual contract of sale except that in addition to the words "the title is to be good of record" are added the words "except as to covenants of record, if any".

December 7, 1922, the appellant Curtis filed a motion to dismiss the bill on the ground that it attempts to deprive her and others of property without due process of law, abridges the privileges and immunities of citizens of the United States including herself, and is forbidden by the Fifth, Thirteenth and Fourteenth Amendments to the Constitution, and the laws enacted in aid thereof (Rec., p. 11).

The motion of the appellant Curtis did not contain the objection that the covenant is void because contrary to public policy; but at the hearing in the trial Court the question of public policy was orally raised, argued and passed upon.

The trial Court in its opinion filed April 12, 1923 (Rec., pp. 11-16) ruled against the appellant Curtis on both grounds, holding that the covenant is not in violation of the Constitution and is not against public policy; and on April 16, 1923, the motion to dismiss was overruled (Rec., p. 16).

April 25, 1923, the appellant Corrigan filed her motion to dismiss on the two grounds that the covenant is void as being in violation of the Constitution and as being contrary to public policy (Rec., p. 16), and on April 27, 1923, the motion of the appellant Corrigan was overruled (Rec., p. 17).

May 4, 1923, both the appellants elected to stand on their motions to dismiss (Rec., pp. 17-18); and on May 8, 1923, a final decree was passed enjoining both appellants, as prayed in the bill, for the period of twenty-one years from the date of the covenant as hereinbefore set out (Rec., p. 18).

From this decree the appellants prosecuted an appeal to the Court of Appeals of the District of Columbia, which, on June 2, 1924, affirmed the decree of the trial Court (Opinion, Rec., pp. 22-25, Decree, Rec., p. 25).

From this decree the appellants have prosecuted this appeal.

QUESTIONS INVOLVED.

The Court of Appeals in its opinion (Rec., p. 23) has clearly and succinctly stated what questions are and what questions are not involved in this case, in the following language:

> "Appellant seems to have misconceived the real question here involved. We are not dealing with the validity of a statute, or municipal law, or ordinance; nor are we concerned with the right of a negro to acquire, own, and use property; nor are we confronted with any pre-existing rights which are affected by the covenant here in question. The sole issue is the power of a number of land owners to execute and record a covenant running with the land by which they bind themselves, their heirs and assigns, during a period of twenty-one years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by, negroes."

The questions raised by the appellants, and decided in the negative by both the Courts below, are:

1. Is the covenant void as being a violation of the Fifth, Thirteenth and Fourteenth Amendments to the Constitution in that it deprives the appellant Curtis of property without due process of law or in that it abridges the priv-

ileges and immunities of the appellant Curtis as a citizen of the United States?

2. Is the covenant void as being contrary to public policy?

3. A third contention, not raised in the trial court, but argued in the appellants' brief, is that the covenant is void because it is in restraint of alienation; and this question, as well as the first two, will be discussed in this brief.

ARGUMENT.

The appellants by their motions to dismiss (general demurrers) admit all the facts well pleaded in the bill of complaint, and the only function of the courts is to apply to these facts the correct legal principles.

The opinions of the Courts below, consisting as they do of a correct analysis and application of all the authorities in point, need no argument to sustain them; and this portion of appellee's brief will be devoted almost entirely to a consideration of the statements and arguments of the appellants and of the authorities cited by them.

No Constitutional Question Involved.

As shown above, the question of constitutionality attempted to be raised in both the Courts below is not concerned with a law or ordinance of a State or sub-division thereof, but concerns a contract, in the form of a mutual covenant running with the land, entered into by private persons, not affecting any pre-existing or vested rights of any persons other than the parties to the covenant.

It will be observed that the appellants have entirely abandoned, in this Court, their attacks upon the covenant itself; and now shift to the ground that the two Courts below have violated the Constitution.

The first point in appellants' brief (p. 6) is:

> **"The decrees of the Courts below constitute a violation of the Fifth and Fourteenth Amendments to the Constitution, in that they deprive the appellants of their liberty and property without due process of law."**

This point is attempted to be maintained on the basis of the proposition that the Courts below, while not legislative bodies of a State, yet are "instrumentalities of the State", and that by their decrees have violated the provisions of Section 1 of the Fourteenth Amendment, which provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and have also violated the provisions of the Fifth Amendment that:

> "No person * * * shall be deprived of life, liberty, or property, without due process of law."

Passing, for the moment, the fact that the District of Columbia is not a State and that the decrees of the Courts below were based upon the fundamental principles of the law of private property, the first question arising is: How and in what manner is either of the appellants deprived of her liberty or property without due process of law? What liberty? What property? What failure of due process of law?

Long before the appellant Corrigan entered into the contract of sale with, and threatened to convey to, the appellant Curtis the land in question, she, as owner of said land, had entered into a mutual contract or covenant with numerous neighboring land owners, duly recorded according to law, whereby she voluntarily curtailed her liberty of action in respect of her property in said land by covenanting that it should not be sold to or occupied by a negro; and the appellant Curtis, having of course a general right to acquire

property, entered into the contract for the purchase of this particular land with full knowledge that its acquisition by her would be in violation of the pre-existing rights of all the other persons parties to the covenant.

The decrees of the Courts below are simply a judicial enforcement of the rights of the appellee which the appellants attempted to invade.

As was recently well said in an able review of the decisions in cases involving the questions herein discussed:

> "True, that a decision becomes a law, but it in no wise violates the Fourteenth Amendment since the court merely gives effect to the contract of the individual. It is, in such a case, discrimination by the individual and not by the courts. If the restriction is not too broad and is otherwise unobjectionable except that it discriminates and the courts refuse to enforce it, is that not a violation of that part of the Fourteenth Amendment which declares 'nor shall any State deprive any person of life, liberty or property, without due process of law'? This provision guarantees to all citizens freedom of contract. The only limitation of this freedom to contract being that it not be in contravention of public policy."

Alfred S. Stolinski, "The Legal Effect of a Contract or Covenant in relation to Real Property which Discriminates against Persons because of Race or Color." 8 Bi-Monthly Law Review, Universitly of Detroit, Nov.-Dec. 1924.

A careful examination of all the cases cited by appellants in support of this contention shows that there is not a single case or authority supporting it.

Furthermore, if the contention of the appellants is sound that the decrees of the Courts below constitute violations of the Fifth and Fourteenth Amendments to the Constitution because those Courts are "instrumentalities of the State", it necessarily follows that the States of California, Louisiana, Michigan, Maryland, Missouri and Virginia have,

through their highest Courts, in cases hereinafter cited, committed violations of the Constitution. Yet even the appellants abstain from carrying their argument to this logical conclusion; and apparently it has never occurred to any lawyer in any of the cases decided by the Courts of those States, upholding the contentions of the appellee in this case, to raise such question and attempt to have any of the decisions in those States reviewed by this Court.

We therefore necessarily revert to the two questions attempted to be raised below, namely, is the covenant void as being in violation of the Constitution, or is it contrary to public policy?

Covenant Not In Violation of Constitution

The principal fallacy in the arguments of the appellants is that by virtue of the provisions of the Constitution a negro has the right to acquire, own and occupy property; therefore he has ~~to~~ the right to acquire, own and occupy any particular property he may desire; therefore the refusal of the owner of a particular piece of property to sell the same to him because he is a negro violates his Constitutional rights as a citizen.

I have a right to refuse to sell or lease my property to a negro or any other individual and it can be purchased against my will only by the sovereign. I have the right to restrict its use or occupancy by deed or covenant binding upon my privies in estate. My neighbors have the same right. My neighbors and I have the right, for the mutual benefit of ourselves and our heirs and assigns and of the land itself, to agree and covenant to the same effect.

The only limitations are that we shall not so use our property as to infringe the rights of others; that the restrictions shall not violate the rule against perpetuities or be in total restraint of alienation and that the agreement shall not be contrary to public policy, that is to say, shall not be injurious to the public welfare.

As the Court of Appeals has aptly said in its opinion (Rec., p. 23):

> "The constitutional right of a negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals."

This Court has held several State laws and municipal ordinances involving denial to negroes of the right to acquire and occupy property in certain sections to be within the prohibition of the Constitutional amendments. It is to be observed that in practically all such cases questions of pre-existing vested property rights were also involved. But this Court, as well as the courts of last resort in the States, have repeatedly distinguished clearly between State, County and Municipal laws and ordinances, and the private actions or contracts of individuals.

See:

Slaughter House Cases, 16 Wall., 36, 67, 88.
U. S. v. Cruikshank, 92 U. S., 542.
In Re Virginia, 100 U. S., 313.
Virginia v. Rives, 100 U. S., 313.
U. S. v. Harris, 106 U. S., 629.
Civil Rights Cases, 109 U. S., 3.
Plessy v. Ferguson, 163 U. S., 537.

It is also definitely established that the Civil Rights statutes are unconstitutional or beyond the power of Congress when applied to the acts of individuals.

U. S. v. Cruikshank, 92 U. S., 542.
U. S. v. Harris, 106 U. S., 629.
Civil Rights Cases, 109 U. S., 3.
Hodges v. U. S., 203 U. S., 1.

It is also definitely established that the Fourteenth Amendment to the Constitution is not applicable to the District of Columbia.

See:

D. of C. v. Brooke, 214 U. S., 138.
Siddons v. Edmonston, 42 App. D. C., 459.

That covenants against ownership or occupancy by negroes are neither unconstitutional nor contrary to public policy is held in the following cases, some of which will be discussed later:

Parmalee, et al. v. Morris, 218 Mich. 624 188 N. W. 330.
Queensborough Land Co. v. Cazeaux, 136 La. 724.
Los Angeles Investment Co. v. Gary, 181 Cal. 680.
Janss Investment Co. v. Walden, et al., Calif. Sup. Ct., p. 34, Advance Sheets Pac. Rep., Vol. 239, No. 1, October 19, 1925.
Koehler v. Rowland, 275 Mo. 573.
Keltner v. Harris (Mo.) 196 S. W. 1.
State v. Gurry, 121 Md. 534.
Pleasants v. Wilson, 125 Md., 237.
Burns et al. v. Williams et al., Circuit Ct. No. 2 of Baltimore City, Md., 72 Baltimore Daily Record, 411, Mar. 1, 1924.
Neighborhood Corporation v. Blum, Circuit Ct. No. 2 of Baltimore City, Md., 72 Baltimore Daily Record, 1131, Dec. 11, 1924.
Peoples' Pleasure Park v. Rohleder, 109 Va. 439.
Hopkins v. Richmond, 117 Va. 693.
There is no case in point *contra*.

The case of Gandolfo v. Hartman, 49 Fed. 181, cited and relied upon by appellants, is not in point.

This was a case decided in 1892 by District Judge Ross in the United States District Court for the Southern District of California.

The suit was for an injunction to prevent the violation of a covenant never to convey or lease land to a Chinaman. The head note is as follows:

> "A covenant in a deed not to convey or lease land to a Chinaman is void, as contrary to the public policy of the government, in contravention of its treaty with China, and in violation of the fourteenth amendment of the constitution, and is not enforcible in equity."

So far as the question of public policy is concerned, the case is opposed to the decisions of the highest court of California.

So far as the decision is based on treaty rights it is not in point.

So far as the question of constitutionality is concerned, the decision is based solely on a complete misconception of the opinion of Mr. Justice Field, on circuit, in the case of Ah Kow v. Nunan, 5 Sawyer, 552.

The latter case involved not the action of individuals but the validity of a municipal ordinance of San Francisco, known as the "Queue Ordinance", and was a suit for damages for maltreatment in the cutting off of the plaintiff's queue.

The ordinance was held to be invalid on several grounds, among others the following, as succintly stated in the fifth headnote:

> "The ordinance being directed against Chinese only, and imposing upon them a degrading and cruel punishment, is also subject to the further objection, that it is hostile and discriminating legislation against a class forbidden by that clause of the fourteenth amendment to the constitution, which declares that no State 'shall deny to any person within its jurisdiction the equal protection of the laws'. This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments, and to the subordinate legislative bodies of its counties and cities."

The case in re: Lee Sing, 43 Fed. 359, cited on page 54 of the appellants' brief is not in point, it involving the validity of a municipal ordinance.

In the case of Parmalee et al. v. Morris, 218 Mich., 624 (June, 1922) the validity was in issue of the following restriction:

> "No building shall be built within 20 feet of the front line of the lot. Said lot shall not be occupied by a colored person, nor for the purpose of doing a liquor business thereon."

All lots were sold subject to the foregoing restriction. Morris, a negro, entered into a contract to purchase one of the lots. The owners of other lots in the subdivision and residents of the same neighborhood filed a bill to restrain defendant from occupying the premises. Motion to dismiss the bill was overruled.

The sole question was: Whether or not the restriction was void as controvening the provisions of the 13th and 14th Amendments to the Constitution.

Moore, J., delivering the opinion of the Supreme Court of Michigan, stated that the opinion of the trial court was so clear that it is reproduced.

Opinion by the trial chancellor, p. 626:

> "Every owner of land in fee is invested with full right, power and authority, when he conveys a portion away to impose such restrictions and limitations in its use as will in his judgment prevent the grantee, or those claiming under him, from making such use of the premises conveyed as will impair the use or diminish the value of the part which he retains. The only limitation on this right is the requirement that the restriction be reasonable; not contrary to public policy and not create an unlawful restraint on alienation. These rights have been repeatedly recognized by our Supreme Court, and in a recent case the following quotation from 7 R. C. L. 114, is cited with approval:
>
> 'A person owning a body of land, and selling a portion thereof may, for the benefit of his remaining land impose upon the land granted any restrictions

> not against public policy, that he sees fit, and a court of equity will generally inforce them. Davidson v. Taylor, 196 Mich. 605, 611.

"1 Since the days of the Civil Rights cases, the law has been regarded as settled that the 13th and 14th Amendments applied to legislative acts of the State rather than the actions of individuals." (Quoting from Civil Rights Cases, *supra,* and referring to United States vs. Cruikshank, *supra.*)

P. 632: "The issue involved in the instant case is a simple one, *i. e.,* shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced or shall one be absolved from the provisions of the law simply because he is a negro? The question involved is a purely legal one and we think it was rightly solved by the Chancellor under the decisions found in his opinion."

It is apropos at this point to call attention to the language of Mr. Justice Bradley in the Civil Rights cases, 109 U. S. 3, quoted by Mr. Justice Brown delivering the opinion of the court in Plessy v. Ferguson, 163 U. S. 537-543:

> "It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater or deal with in other matters of intercourse or business."

In Queensborough Land Co. vs. Cazeaux, *et al.*, 136 La., 724, decided in 1915, the two questions of constitutionality and public policy were decided in respect of a restriction against sale or lease to negroes. The case was heard by the Supreme Court of Louisiana on certification by the Court of Appeal, Second Circuit, for the determination by the Supreme Court of questions arising upon appeal by defendants from a judgment of the District Court for the Parish of Caddo in plaintiff's favor in an action brought to enforce a

covenant in a deed of real estate forbidding the sale of the property to negroes, and recover possession of the property for breach thereof.

Facts: Lots in a subdivision were sold subject to a covenant that vendees, their heirs and assigns should for 25 years refrain from selling or leasing lots to negroes. One lot sold to Cazeaux who sold to his co-defendant, a negro.

Case certified with request that the following questions, among others, be answered:

1. Does the stipulation in the deed with reference to the transfer of the property to a negro violate the 14th Amendment of the Constitution of the United States?

2. Is said provision contrary to the public policy of this State, and therefore null and void?

The Court decided the two questions adversely to the defendants, saying, through Provosty, J.:

> "The first, because the general government has not undertaken to interfere with private rights within the States in the interest of the negro race. The 14th Amendment, in as far as prohibiting discrimination against the negro race, applies only to state legislation, not to contracts of individuals. Civil Rights Cases, 109 U. S. 62. The matter is one purely of state, or local, interest, with which the general government has no concern and upon which therefore it can have no policy. Ex parte Plessy, 45 La. Am., 80.
>
> "To the second question we answer that, while the public policy of the State opposes putting property out of commerce, it at the same time favors the fullest liberty of contract."

The case of Title Guaranty & Trust Co. vs. Garrott, 42 Calif. App., 152, cited by appellants, involved the validity of a covenant providing for absolute forfeiture to the grantor in case of alienation to persons of certain races and was decided by reference to the provisions of the California statute forbidding restraint of alienation. The Court of Appeals in this case said, at page 161:

> "There is a clear distinction between a restriction on *use* of the premises by the grantee in a deed conveying the fee, imposed by a condition or covenant whereby reasonable building restrictions are created and a direct restraint on alienation. It is true a restriction upon use may narrow the circle of possible purchasers. * * * Certain it is that a restriction upon use only is not within the letter or spirit of section 711 of the Civil Code, or of the Common Law doctrine of which that section is a codification."

This case was decided in July, 1919, and the Supreme Court of California denied a hearing in that Court.

Subsequently, December, 1919, the Supreme Court decided the case of Los Angeles Investment Company vs. Gary, 181 Calif., 680, in which, referring to the case of Title Guaranty & Trust Co. vs. Garrott, it is said, page 682:

> "The decision in that case July 10, 1919, was presented to us for consideration by a petition for rehearing, and the petition was denied because of our conclusion that the decision was correct, a conclusion from which we see no reason for departing. The demurrer was, therefore, properly sustained as to the alleged cause of action based on the fact that the lot in question had been sold to the defendant Gary.
>
> "The condition, however, that the property should not be occupied by a person not of Caucasion birth is in a different category. It is not a restraint upon alienation, but upon the use of the property."

Los Angeles Investment Co. vs. Gary, *supra,* was an action to declare forfeiture of title to property for breach of a covenant which provided that the property should not be sold, leased or rented to or occupied by any person not of the Caucasian race, for breach of which the property should revert to the grantors, their successors, devisees or assigns.

The Court held that the condition prohibiting the sale was clearly a restraint on alienation, that the deed likewise purports to convey a fee, and an incident of an estate in fee

is the right of free disposal or transfer, and that this restraint was repugnant under the Code of California.

> "The condition, however, that the property should not be occupied by a person not of Caucasian birth, is in a different category. It is not a restraint upon the alienation, but upon the use of the property. * * *
>
> "The particular condition in this case being one against the occupation of the property by persons not of the Caucasian race, the question suggests itself as to whether it is an unlawful discrimination against certain classes of citizens, and therefore within the prohibition of the Federal Constitution. This question, however, it settled conclusively against the defendants by repeated decisions of the United States Supreme Court; the provision of the Federal Constitution material is the 14th Amendment. It provides: 1. No state shall * * * deny to any person within its jurisdiction the equal protection of the law.
>
> "Construing this amendment, the Supreme Court of the United States has held in a number of instances that the inhibition applies exclusively to action by the State and has no reference to action by individuals, such as is involved here (citing U. S. v. Cruikshank, 92 U. S. 542; Va. v. Rives, 100 U. S., 313; U. S. v. Harris, 106 U. S. 629; Civil Rights Cases, 109 U. S. 3, and many other cases).
>
> "Our conclusion is that the condition against the occupation of the property by any one not of the Caucasian race is valid, and that, since a breach of this condition is alleged, the complaint states a cause of action."

The latest case in point which has come to the attention of counsel is the case of Janss Investment Co. vs. Walden et al., decided by the Supreme Court of California, sitting in bank, August 26, 1925, rehearing denied Sept. 24, 1925, and reported at p. 34. Advance sheets, Pacific Reporter, Vol. 239, No. 1, October 19, 1925.

The headnote is as follows:

> "A provision in an installment contract for sale of a lot, that the property should not be used or occupied

by any person who was not of the Caucasian race *held* valid, it being a restraint on use of property and not on alienation."

The facts in the case were that the Janss Investment Co. sold, from a subdivision, a lot to Walden, under an installment contract containing the following paragraph:

> "No part of said real property shall ever be leased, rented, sold or conveyed to any person who is not of the white or Caucasian race, nor be used by any person who is not of the white or Caucasian race, whether grantee hereunder or any other person."

The contract also provided that it should not be transferable without the written consent of the grantor upon payment of a fee of $1.00.

The day after the contract was entered into, Walden, a white man, attempted by quit-claim deed, to convey to the defendants Walling, who are negroes. The Court says:

> "The sole question presented for determination by this court is as to the validity of that part of the condition of the contract between the parties thereto that 'No part of said real property shall ever * * * be used or occupied by any person who is not of the white or the Caucasian race * * *'
>
> "If the question were a new one to this court it would demand careful investigation of the legal principles and the authorities presented by appellant in support of his contention touching the constitutionality of the condition set forth in the contract, to which reference has been had. In view, however, of the fact that the identical question has been raised recently in a preceding case and passed upon by this tribunal adversely to appellant's contention in the case at bar, it becomes unnecessary and inadvisable to devote much time or thought to a consideration of the legal points suggested by appellant. We refer to the case of *Los Angeles Investment Co. v. Gary*, 181 Cal. 680. The facts therein as stated in the opinion of the court, were that the plaintiff was the owner of a tract of land which had been subdivided into town lots; that it sold one of such

lots to a man named Renaker, who in turn sold it to defendant Gary, who was a negro, and who, with his wife, who was a colored woman, thereafter went into the use and occupation of the property. The deed by which the property was conveyed by the plaintiff therein to Renaker contained a condition '* * * that the said property shall not be sold, leased or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots.' The deed there, as the contract here, also contained the usual forfeiture and reversionary clauses for breach of any of its conditions. It will thus be seen that the facts in the two cases are practically identical one with the other.

"The matter seems to have been thoroughly considered both by the court sitting in department and, later, on petition for rehearing, by the court sitting in bank. The conclusion reached, as fairly stated in the syllabus, was that 'The provision in a deed that no person or persons other than of the Caucasian race shall be permitted to occupy the property, is not a restraint upon alienation, but upon the use of the property, and is valid.' "

This case seems to dispose of the appellants' criticisms of the two last cited California cases.

The case of Keltner vs. Harris, 196 S. W., 1, (Missouri), was a suit to set aside a deed, the relief sought being granted. The facts were that the plaintiff, a white man, owned a house and had entered into a contract to purchase adjoining property, which is in controversy, and subsequently entered into contract to sell the same to a white man. He conveyed to this man, who on the same day conveyed to a colored man. Evidence was that defendant knew plaintiff and other neighbors objected to the sale because of the purchaser's color, and that the agent obtained deed through false representations.

The Court stated, p. 2: "In other words, no man is bound to sell his property to a proposed purchaser, whose presence is unsatisfactory to him as a neighbor, whether he be white, black or of some other color."

Since the decisions in State vs. Gurry, 121 Md., 534, and Pleasants vs. Wilson, 125 Md., 237 (both of which will be fully discussed herein under the head of Public Policy), the two following cases have been decided in the Circuit Court for Baltimore City, Maryland, namely: Burns, *et al.*, vs. Williams, *et al., supra;* and Neighborhood Corporation vs. Blum, *supra.* In the first case the Court decided as follaws:

> Dawkins, J.:
>
> "The Court is of the opinion that the agreement between the plaintiff and the defendant and other parties mentioned in said agreement, which is referred to and copy of which is filed with the bill of complaint and made part thereof, whereby all said parties covenant each with the other that they and each of them, their and each of their heirs, personal representatives, successors and assigns shall and will have, hold, stand seized and possessed of the said respective properties mentioned in said agreement as owned by them subject to the restriction, limitation and condition that neither the said respective properties nor any of them nor any part of them or any of them shall be at any time occupied or used by any negro or negroes or person or persons either in whole or in part of African descent, except only that negroes or persons of negro or African descent either in whole or in part may be employed as servants by any of the owners of said properties and containing other stipulations is not void as being in conflict with any provisions of the Constitution of the United States or the amendments thereof or as being against public policy or any rule of law, all persons owning property having a perfect right by voluntary agreement among themselves to subject it to such limitations and restrictions and such agreements when duly recorded in the proper land records of Baltimore City, constituting notice to all subsequent purchasers of said property of the terms and conditions thereof."

Because, however, of a further provision in the agreement that it should not be enforceable in equity unless executed in respect of all the property in the area mentioned

in the agreement, and it appearing that it had not been executed in respect of all such property, the Court dissolved the preliminary injunction and dismissed the bill.

In the second case the same Court, in granting a permanent injunction against the breach of similar covenant, said:

> Dawkins, J.:
>
> "I indicated at the close of this case that I felt inclined to follow the ruling I made in a similar case about six months ago. People who sign these agreement have a perfect right to do it and thereby bind themselves, their heirs, representatives and those following them in title.
>
> "It is my judgment that it is not only not against public policy, but it is in line with public policy that people who own property should have this power and the right to impose upon said property the restriction as to the kind of people who shall own the same.
>
> "The case to which I have referred gives my views as to such agreements. I now hold the same view as then expressed as to the right of property owners to bind themselves not to sell or rent their property to persons of any special kind or class."

Neither of the cases went to the Court of Appeals of Maryland.

In the case of Spilling vs. Hutcheson, 111 Va., 179 (discussed hereinafter under Remedy), a suit of mandatory injunction to compel performance of a covenant concerning land, the Court quoted with approval the language of Lord Cairns in Doherty vs. Allman, 3 H. L. App. Cas. 729, as follows:

> "If parties, for a valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done, and in such case the injunction does nothing more than to give the sanction of the process of the court to that which already is the contract between the parties."

A careful examination of all the cases cited by the appellants in support of their contentions under their first point, that is to say, upon the constitutonality *vel non* of the covenant in question, and the constitutionality *vel non* of the actions of the lower Courts in passing and affirming the decree appealed from, shows none to be in point.

The principal case relied upon by appellants, the case of Buchanan vs. Warley, 245 U. S. 60, repeatedly cited and quoted from by them, is not in point; the question involved in that case being the constitutionality of a municipal ordinance of Louisville, Kentucky, requiring segregation of the races in residential districts and forbidding the transfer of property, etc.

At page 81 of the opinion Mr. Justice Day, speaking for this Court, put in very concise form the very heart of the case—the sole question at issue in the case—when he said:

> "The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person."

We have no such situation in the case at bar. Here, we have no law ordinance or decree of a court attempting to annul the right of either a white man or a negro to dispose of his property as he may see fit. What we have, first, is the case of more than a score of neighboring white persons and home owners mutually surrendering, for valuable considerations, by a covenant duly executed, acknowledged and recorded in the land records, their right to convey their respective contiguous properties to negroes, or to permit negroes to occupy the same; and, second, a decree of a court of competent jurisdiction forbidding a threatened and attempted violation of the contractual rights of the other parties to the covenant.

In their brief at page 15 the appellants argue:

> "To test the incongruity of such a situation, let us suppose that after the decision in Buchanan v. Warley, the Common Council of the City of Louisville had adopted an ordinance permitting the residents of the same districts which were affected by the ordinance which this Court had declared unconstitutional, to enter into a covenant in the precise terms of that which the Courts below have enforced in this case, would it not at once have been said that it was an intolerable invasion of the Constitution as interpreted by this Court. But that is exactly what has been done in the present case by the adjudications which are now here for review."

The answer to this is that no action of the Common Council of Louisville is necessary to permit citizens to enter into such a covenant affecting their own property; that if such a covenant should be entered into by either white or negro residents of certain sections of that city such action would put the question in a totally different category—one in which the parties to such covenant would be voluntarily surrendering or restricting their own pre-existing rights.

On page 16 of their brief the appellants suggest another supposititious case, that is to say, after the decision in Buchanan vs. Warley, "would this court have countenanced an amendment of the decree which it had reversed providing that ninety per cent of the residents of the district in which segregation had been attempted might enter into a covenant in precisely the same terms as the ordinance and that, thereupon, such covenant should be in full force and effect?"

The obvious answer to this question is its own adsurdity.

The constitutionality of laws segregating the white race from the negro and other colored races in public conveyances, in schools and otherwise, the miscegenation laws, and the separation in many of the walks of life by general and uniform habit and custom of the several races themselves, will be discussed under the head of Public Policy.

THE COVENANT IS NOT CONTRARY TO PUBLIC POLICY.

In the case of Hollis vs. Drew Theological Seminary, *et al.*, 95 New York 166 (cited by the appellants on page 28 of their brief as "*Hollins* vs. Drew Theological Seminary), the court, at page 172, defines public policy as follows:

> "In a juridical sense, public policy does not mean simply sound policy, or good policy, but as defined by Daniel Webster in the Girard Will case (2 How. 127), it means the policy of a State established for the public weal, 'either by law, by courts, or general consent.' "

As stated in Kintz v. Harriger, 99 Ohio State, 240, cited by appellants in their brief in the Court of Appeals, public policy:

> "May be generally said to be the *community common sense and common conscience* extended and applied throughout the State to matters of public morals, public health, public safety, public welfare and the like. It is that *general and well-settled public opinion* relating to man's plain, palpable duty to his fellow-man, that has due regard to all circumstances of each particular situation."

The appellee accepts the definitions of public policy tendered by appellants.

In the case of Hartford Fire Ins. Co. vs. Chicago, M. & St. P. R. R. Co., 175 U. S. 91, also cited by appellants, Mr. Justice Gray, speaking for this court, said at page 100:

> "Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State as expressed in its own Constitution and statutes, or declared by its highest court."

In the same case this Court quoted with approval, at page 102, the following statement from 26 Iowa 202:

> "The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

Both the Courts below have decided that the covenant is not contrary to public policy.

The Court of Appeals of the District of Columbia is not the highest court of a State of the Union in the strict sense, but it is the highest court of a territorial sub-division of the United States with a population greater than several of the States. Its jurisdiction is broader than any of the State or inferior Federal courts, embracing, as it does, all matters and questions of law and equity which, in the States, are divided between the State and the Federal Courts.

The Congress has made its judgments final and not reviewable by this Court by appeal or writ of error, but only by certification or certiorari. (Judicial Code and Amendatory Act of February 13, 1925.)

Its decision of the local question of public policy would therefore seem, under the case of Hartford Fire Ins. Co. vs. Chicago M. & St. P. R. R. Co., *supra,* to be conclusive.

This Court will take judicial notice, as did both Courts below, not only of legislation by the Congress for the District of Columbia, but also of the existence of facts and conditions, of habits and customs, of "community common sense and common conscience" and of "general and well-settled public opinion" which are matters of common knowledge. As stated in 23 C. J., §. 1810, p. 50:

> "The Courts will take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction; and they ought not to assume ignorance of, or exclude from their knowledge, matters which are known to all persons of intelligence."

The Supreme Court of the District of Columbia said in its opinion, record page 15:

> "In Wall vs. Oyster, 36 App. D. C. 50, the statute providing for separate schools for white and colored children in the District of Columbia was upheld.
>
> "As pointed out by the plaintiff's counsel the municipal authorities of the District have provided for separate bathing beaches, tennis courts, golf course and play ground."

After discussing the rule concerning segregation of the races as announced in the case of Plessy vs. Ferguson, 163 U. S. 537, the Court of appeals said in its opinion, record, page 24:

> "The foregoing rule applies not only to segregation in railway coaches but to statutes requiring separate white and colored schools, as well as regulations providing for the segregation of the races in municipal play grounds, municipal golf courses, municipal tennis courts, and municipal bathing beaches. The same general and settled public opinion controls in respect of the segregation of the races in churches, hotels, restaurants, lodging houses, apartment houses, theaters, and places of public amusement.
>
> "It follows that the segregation of the races, whether by statute or private agreement, where the method adopted does not amount to the denial of fundamental constitutional rights, can not be held to be against public policy. Nor can the social equality of the races be attained either by legislation or by the forcible assertion of assumed rights."

It is clear from the cases already cited that the covenant in this case is not only not in violation of the Constitution, but is not invalid as being contrary to public policy.

The case of *State* vs. *Gurry*, 121 Maryland, 534, involved the validity of a Municipal ordinance of Baltimore City providing for the segregation of white and colored people in different residential districts. The Court of Appeals

of Maryland held the ordinance invalid because it affected prior vested rights.

The elaborate discussion of the ordinance from the standpoint of public policy is, however, important especially as it is by the highest court of the State of Maryland, of which the District of Columbia was formerly a part, and from which it has taken the great bulk of its laws, customs, habits and mode of life.

The court discusses this subject as follows:

> P. 541. "Both State and Federal Courts have been most industrious in dealing with the many cases growing out of the laws claimed to have been passed in the exercise of this power, known as the police power, and it might be well to consider what is meant, in a constitutional sense, by that term. As was said by that learned jurist, CHIEF JUSTICE SHAW, in Commonwealth vs. Alger, 7 Cush. 53: 'It is much easier to perceive and realize the existences and sources of this power than to mark its boundaries, or prescribe limits to its exercise.' And the definition there given has been, probably, more often quoted with approval than any other. 'The power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either wth or without penalties, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." (Citing and quoting numerous State and Federal authorities and decisions of this Court).
>
> * * * * * * * * *
>
> P. 543. "The Supreme Court has, times almost without number, been called to pass upon laws enacted by the States upon matters relating to their internal government, and has given expression to the meaning to be ascribed to the police power. In the Slaughter House Cases, 16 Wall. 62, which were the first cases involving a construction of the Fourteenth Amendment, the Court said: 'This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of

social order, the life and health of citizens, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property.' 'It extends' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State,' 'and persons and property were subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or upon acknowledged principles, even can be made so far as natural persons are concerned.' " (Citing and quoting numerous State and Federal authorities and decisions of this Court).

* * * * * * * * *

P. 546. "If then this power is inherent in every State for the preservation of its general welfare, is the ordinance in question an unreasonable exercise of it and are its provisions so arbitrary and oppressive that they amount to the invasion of a person's constitutional rights?

"As we have seen the avowed object of the ordinance is to preserve peace, prevent conflict and ill feeling between the two races and thereby promote the welfare of Baltimore. The means employed are that blocks which were occupied by colored people exclusively should continue to be occupied by them exclusively, and that blocks occupied exclusively by white people should so continue to be occupied by them."

* * * * * * * * *

"No intelligent observer in communities where there are many colored people can fail to notice that there are sometimes exhibitions of feelings between members of the two races, which are likely to, and occasionally do, result in outbreak of violence and disorder. It is not for us to say what this is attributable to, but the fact remains—however much it is to be regretted—and if a segregation of the races to such extent as may be permissible under the Constitution and laws of the land will have a tendency not only to avoid disorder and violence, but to make a better feeling between the races, everyone having the interests of the colored people as well as of the white people at heart ought to

encourage rather than oppose it. Mr. Justice Brown said in Plessy v. Ferguson, 163 U. S. 537: 'The object of the amendment (14) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a comingling of the two races upon terms unsatisfactory to either.'

"If the welfare of the city, in the minds of the Council, demanded that the two races should be thus, to this extent, separated and thereby a cause of conflict removed, the Court cannot declare their action unreasonable. It was acknowledged by the counsel for the appellee, both in the brief and in verbal argument, that for years there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people. With this acknowledgment how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?"

The case of Pleasants vs. Wilson, 125 Md. 237, involved the power of trustees to impose restrictions on trust property.

The Court says at page 239, that: "The single question presented for our decision is, whether the trustees, the appellees here, have the power and authority under the will of the testator, to impose the restrictions, agreed upon in the contract of sale, on the remaining unsold property held by the trustees and this will depend upon the construction of the power conferred by the will itself, and the intent of the donor of the power, as to the mode in which the power must be executed."

The Court decided the question in the affirmative, namely, that the trustees had the power to impose the restriction; but did not quote in the opinion the provisions of the restrictions which it held to be valid; one of which, as

appears in the printed record of the Court of Appeals of Maryland in this case provides that:

> "At no time shall the land included in said tract or any part thereof, or any building erected thereon, be occupied by any negro or person of negro extraction."
>
> See also: Burns et al., v. Williams et al., *supra.*
>
> Neighborhood Corporation vs. Blum, *supra.*

The foregoing decisions of the Maryland Courts if not controlling are highly persuasive for the reasons hereinbefore stated.

In Hopkins vs. Richmond, 117 Va. 693, involving the validity of an ordinance segregating the white and colored races, the questions of reasonableness and constitutionality were involved.

Upon the question of reasonableness or public policy the court said at page 709:

> "The central idea of the ordinance under consideration seems very manifest. It is to prevent too close association of the races, which association results, or tends to result, in breaches of peace, immorality and damage to the health * * * The attainment of the objects in view is one much to be desired * * *."

The Court also at page 716 quoted with approval the following from Weschester & P. Co. vs. Miles, 55 Pa. 209:

> "The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right."

The court then continued:

> "When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice or caste, but simply to suffer men to follow the law of

> races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

See also the cases hereinbefore cited under the question of Constitutionality which also deal with the question of Public Policy.

Segregation Accords With Public Policy.

The segregation of the races, whether by statute or private agreement not involving the denial of fundamental constitutional rights, is clearly not only not against public policy but is in strict accord with the long established public policy of most of the States of this country and of the District of Columbia.

Intermarriage Prohibited.

As bearing upon the distinction between the general and particular rights of negroes as well as other citizens, the course of legislation and judicial decision upon another clear right should be considered. Every citizen has a right to marry. This is a general right, for no one has a right to marry another without the latter's consent. But the exercise of this right has been forbidden from earliest times in this country, and is still so forbidden, between certain individuals, on account of race and color.

In 27 Cyc. 798, it is said:

> "The term miscegenation is variously employed to indicate the intermarriage or cohabitation or sexual intercourse between persons of the opposite sex who belong to different races or both marriage and cohabitation between them."

See particularly State vs. Tutty, 41 Fed. 753; 7 L. R. A. 50, an exhaustive opinion delivered by U. S. District Judge Speer, Georgia.

27 Cyc. 800:

"The statutes of the States which have legislated upon the subject prohibit miscegenation between the Caucasian or white race, on the one hand; and, on the other, either the first alone, or that and one or both of the other two, of the following three races: the African, or black race; the Indian race; and the Mongolian race."

27 Cyc., 899, Note 2:

"It exists almost exclusively in those States of the Union in which non-Caucasian races form a considerable element of the population, as, in the Southern States, the African or black race, in the Western States, the Mongolian or yellow race, in the States of the midle or southwest, the Indian. It is the public policy of these States to maintain separate marital relations between these races and the white race, based upon the belief that the offspring of cohabitation between them are inferior in physical development and strength to the full blood of either race. Scott v. State, 39 Ga. 321."

In the case of Plessy vs. Ferguson, 163 U. S. 537, 41 L. Ed. 256, Mr. Justice Brown, delivering the opinion of this Court, refers to the miscegenation laws as follows at page 545:

"Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the Police Power of the State." Citing State vs. Gibson, 36 Ind. 389.

Justice Brown continues:

"The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages, has been frequently drawn by this Court."

In Scott vs. Sanford, 19 How. 393 (15 L. Ed. 691) Chief Justice Taney refers at p. 408-409 and again at p. 413 to

the successive laws passed by the Provinces and also by the States prohibiting miscegenation either between white and negroes or whites and Indians or whites and mulattoes. The Province of Maryland passed such an act in 1717; Massachusetts in 1705; Massachusetts again in 1786 and again in 1836; Connecticut in 1788, etc.

The attitude of most of the States concerning miscegenation, as expressed in legislation and the decisions of the State and inferior Federal courts and of this court (see Plessy v. Ferguson, *supra*, and other cases cited), is proof of this.

Thirty of the States have laws preventing marriage between whites on the one hand and negroes or mulattoes, and in some cases Indians and Mongolians on the other hand.*

The wisdom of the miscegenation laws, whose purpose is to prevent the production of a mongrel race, the members of which are inferior to either of the original races from which they spring, is demonstrated as well by ancient history as by modern example.

The destruction of most ancient civilizations was due to mongrelization. The destruction of many modern states is rapidly proceeding, due to the same cause.

See:

"Race or Mongrel," A. P. Schultz.
"The Passing of the Great Race," Madison Grant.
"America: A Family Matter," Charles W. Gould.

And nothing so directly operates to bring about a violation of this law—not only a law of the State but a Law of Nature—as the breaking down of racial distinctions and the commingling of divers races, which, as this Court has said

*The States having laws prohibiting miscegenation are as follows: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Indiana, Idaho, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming.

in Plessy v. Ferguson, *supra*, was not intended to be brought about by the Fourteenth Amendment, the object of which was to enforce the legal and political equality of the two races, as well as of all other citizens.

The doctrine of the "Melting Pot," as applied to the amalgamation of the White, Red, Yellow and Black races in America, is the most dangerous of all the doctrines advanced by the modern altruistic sentimentalists. Carried to its logical conclusion it means the mongrelization of America and the destruction of American civilization.

Mixed Schools Prohibited.

In Plessy v. Ferguson, *supra*, this Court not only refers to the miscegenation laws, but also to the enforced separation of white and colored children in the public schools, which, this Court says: "Has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been long and most earnestly enforced."

This Court then refers to the school laws of Massachusetts and to the legislation by Congress for the District of Columbia and to the fact that the legislatures of many of the States have passed similar laws which "have been generally, if not uniformly, sustained by the courts."

As to the wide extent of laws or regulations requiring separate white and colored schools in all sections of the United States and in Canada, see 35 Cyc. 819 and 1111; and 43 Cent. Dig. Tit. "Schools and School Districts", sec. 15.

Sixteen of the States and also the District of Columbia have laws requiring separate schools to be maintained for white and colored children; in addition to which California has a law authorizing the establishment of separate schools for Indians, Mongolians, Japanese or Chinese children.*

*The States requiring separate schools for the races are as follows: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia.

The case of Roberts vs. Boston, 5 Cush. (Mass.) 198, upheld the rights of the school committee to maintain separate schools for white and colored children in Boston, notwithstanding there was no express legislative authority for the same.

In this case there were in Boston about 160 primary schools maintained for children between five and seven years of age, two were appropriated to the use of colored children and the others to white children. Plaintiff, a colored child, had been excluded from the primary school nearest her home which was for white children only, the nearest school for colored children being about one-fifth of a mile further. The Court held that it was the rightful authority of the school committee to separate the colored children from the white in the City of Boston. In the course of the opinion, the following appears: (p. 206)

"The great principle, advanced by the learned and eloquent advocate of the plaintiff, is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and proection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions."

In the case of State ex rel. Clark, vs. Maryland Institute, 87 Md. 643, it was held that a private educational institution could lawfully exclude colored pupils, and that in so excluding them, it violated no rights secured by the fourteenth amendment to the constitution. In this case the City of Baltimore contributed money to the Institution. A councilman appointed a negro to the school, it refused to admit him and he brought mandamus to compel his admission.

In the case of Booker et al., vs. Grand Rapids Medical College, 156 Mich. 95, it was also held that a negro is denied no constitutional right by being excluded from a private corporate institution of learning.

In People vs. Gallagher, 93 N. Y. 438, the Court, Ruger, C. J., said concerning the right of a State to maintain separate schools for white and colored children, page 450:

"A natural distinction exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgement of its civil rights."

(See further extracts from this case in the opinions of both the Courts below.)

As above noted the Congress itself has expressed the public policy in the District of Columbia concerning segregation of the races in the public schools in legislation, the constitutionality and validity of which have been sustained in the case of Wall v. Oyster, 36 App. D. C. 50.

Other Segregation

The validity of laws requiring separate but equal accommodations for the races in public conveyances is so well settled as to need no more than mention.

It is perfectly clear, and the legislation now in effect throughout the United States and the judicial decisions sustaining such legislation emphasize the fact, that the co-

mingling of the races, rather than their segregation, tends to stimulate antipathy between them, and that the trend of legislation is towards segregation.

In this connection attention is called to the case of Terrace v. Thompson, 263 U. S. 197.

As has been pointed out above, both of the lower Courts have taken judicial notice, and this Court will also take judicial notice, not only of the legislation of the Congress for the District of Columbia, but also of the uniform legislative-executive actions of the municipal authorities of the District of Columbia in segregating the races in: (a) Municipal Playgrounds, (b) Municipal Golf Courses, (c) Municipal Tennis Courts and (d) Municipal Bathing Beaches; as well as of "the community common sense" and the "general and well-settled public opinion" (Kintz v. Harriger, *supra*) which has existed from time immemorial in the District of Columbia in respect of the segregation of the races in churches, hotels, restaurants, lodging houses and apartment houses, and in theaters and other places of public amusement.

Can it be questioned that the owner of an apartment house is at liberty to refuse to rent one of his apartments to a negro? Can there be any question that a number of owners of an apartment house on the co-operative plan can enter into a valid and enforceable agreement binding themselves, their heirs and assigns, not to permit any one of the apartments to be occupied by a negro? Can it be questioned that a group of white home owners in a restricted neighborhood can do likewise?

The Communistic Argument

The immaterial and extrinsic arguments scattered throughout the appellants' brief assume that the white people of the United States own and control or could obtain ownership and control of all property, not only in the City of Washington, but throughout the District of Columbia,

and elsewhere, and are adaptations of the communistic doctrine so eloquently, even if unconvincingly, expressed by Bernard Shaw, who argues that because the habitable area of the earth is limited a time will come when there is no land for certain men and therefore the institution of private property and the right of an individual to own land must be abolished.

After describing how the first Adam preempted the best land and succeeding Adams, Cains and Abels get land less and less fertile, until all the land is occupied, he says:

> "But at this point there appears in the land a man in a strange plight—one who wanders from snow line to sea coast in search of land, and finds none that is not the property of some one else. Private property had forgotten this man. On the roads he is a vagrant: off them he is a trespasser: he is the first disinherited son of Adam, the first Proletarian, one in whose seed all the generations of the earth shall yet be blest, but who is himself for the present foodless, homeless, shiftless, superfluous, and everything that turns a man into a tramp or a thrall."

He later proceeds:

> "In due replenishment of the earth there comes another Proletarian who is no cleverer than other men, and can do as much, but not more than they. For him there is no rent of ability."

And finally he says that all this: "is practically a demonstration that public property in land is the basic economic condition of Socialism," and private property must be abolished.

Fabian Essays in Socialism, 1889, pp. 3-29.

COVENANT NOT VOID AS RESTRAINING ALIENATION.

In 18 Corps Juris, 361, Sec. 378, it is stated:

> "If an estate is granted in fee, conditions or restrictions absolutely restraining alienation, when repugnant to the estate created, are void as against public policy. There may, however, be a restriction upon such power to a limited extent." (Citing numerous cases, including Queensboro Land Co. v. Cazeaux, 136 La. 724-730; cited above.)

See also cases cited under note 79 at page 361.

The case of Cowell v. Colorado Springs Co., 100 U. S. 55, referred to by appellants on pages 56 and 58 of their brief, sustains the doctrine contended for by appellee; and would seem to settle this question.

In this case the Colorado Springs Co. sold to Cowell two lots, the deed containing a clause to the effect that intoxicating liquors should never be sold on the premises, and in the event of such sale the deed should become null and void and the title should revert to the grantor. Liquor was sold and the grantor brought an action in ejectment. In answer to the contention that the condition was repugnant to the estate granted Mr. Justice Field, delivering the opinion of this Court, says at page 57:

> " * * * But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate." * * * "Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character."

The case of Potter v. Couch, 141 U. S. 296, cited by appellants on page 32 of their brief (and misquoted) is, in fact, when properly read, authority for the appellee.

At page 315 Mr. Justice Gray, speaking for the Court, first states the doctrine that a condition against *all* alienation is void, because repugnant to the estate devised. He then points out that a restriction, whether by way of condi-

tion or of devise over, "not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time" is likewise void as repugnant to the estate devised.

Here the clear distinction is made as between a condition against *all* alienation and a condition against alienation *to particular persons* or *for particular purposes only.*

On page 32 of their brief, appellants quote from the opinion of Mr. Justice Gray in Potter vs. Couch, *supra,* as follows (citing page 313, the correct citation being page 315):

> "But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Lit., Sec. 360; Co. Lit., 206b 223a; 4 Kent Com., 131; *McDonogh* v. *Murdock,* 15 How., 367, 373, 412. For the same reason, a limitation over, in case the first devise shall alien, is equally void, whether the estate be legal or equitable. *Howard* v. *Carusi,* 109 U. S,. 725; *Ware* v. *Cann,* 10 B. & C., 433; *Shaw* v. *Ford,* 7 Ch. D., 669; *in re Dugdale,* 38 Ch. D., 176; *Corbett* v. *Corbett,* 13 P. D., 136; *Steib* v. *Whitehead,* 111 Illinois, 247, 251; *Kelley* v. *Meims,* 135 Mass., 231, and cases there cited. And on principle, and according to the weight of authority (notwithstanding opposing dicta in *Cowell* v. *Springs Co.,* 100 U. S., 55, 57, and in other books), a restriction, whether by way of condition or of devise over, on any and all alienation, although for a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Roosevelt* v. *Thurman,* 1 Johns., Ch. 220; *Mandlebaum* v. *McDonell,* 29 Mich., 77; *Anderson* v. *Cary,* 36 Ohio St., 506; *Twitty* v. *Camp,* Phil. Eq. (No. Car.) 61; *In re Rosher,* 26 Ch. D., 801."

It will be observed that appellants have inserted in their quotation a phrase which is not in the opinion, namely:

> **"(Notwithstanding opposing dicta in Cowell v. Colorado Springs Co., 100 U. S., 55, 57, and in other books)."**

Whether this was done by inadvertance or in an endeavor to make it appear that this Court had disaffirmed the doctrine laid down in Cowell v. Colorado Springs Co., *supra,* and had characterized the language of Mr. Justice Field in the Colorado Springs case as dictum, the appellee is unable to determine.

The important fact is that the opinion in the Colorado Springs Co. case stands and is controlling in this case. It is to be observed that Mr. Justice Field sat and concurred in the opinion in the case of Potter v. Couch, *supra.*

See also: Camp v. Cleary, 76 Va. 140; the 4th headnote of which is as follows:

> "Power of alienation may be restricted to a limited extent, as to designated persons; but absolute restraint is inadmissible," etc.

See pages 143 and 147, as to the rule against perpetuities.

Koehler v. Rowland, 275 Mo. 573: Lot sold subject to provision that it shall not be sold, leased or rented to any negro for 25 years and on breach property shall revert. Defendant leased to negroes. Lower court adjudged plaintiffs were owners in fee simple as defendant had forfeited his rights. Defendant among other contentions, asserted that the restriction is an unlawful restraint upon alienation.

> "All the cases cited by respondent in support of the position are when there is a stipulation directly prohibiting alienation. It is the rule that an absolute restriction in the power of alienation in conveyance of a fee simple title is void, but it is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes. Cowell v. Colorado Springs Co., 100 U. S. 55; Devlin Real Estate S. 965.
>
> "The condition in the deed under consideration does not come within the rule prohibiting restraints upon alienation."

The Court discussed the question of public policy, citing Slaughter House and Plessy vs. Ferguson cases, and held it

not contrary to public policy to discriminate against negroes in certain matter, for example segregation.

See also Keltner vs. Harris, *supra.*

Firth v. Marovich, 160 Cal. 257;
DeGray v. Monmouth Beach Clubhouse Co., 50 N. J., Eq. 329;
Parmalee et al v. Morris, *supra.*

See also the other cases cited above under the heads of Constitutionality and Public Policy.

The validity of a covenant in partial restraint of alienation or containing restrictions as to use and occupancy is definitely established, especially for the District of Columbia, by this Court in Cowell v. Colorado Springs Co., *supra,* and Potter v. Couch, *supra;* and by the District of Columbia and Maryland cases cited herein.

INJUNCTION PROPER REMEDY.

That injunction to prevent violations of covenants and thereby to compel specific performance of the same is the proper remedy is clear from the following cases:

Chevy Chase Land Co., vs. Pool, 48 App. D. C. 400;
Spilling vs. Hutcheson, 111 Va. 179;
Citing: Doherty vs. Allman, 3 H. L. App. Cas. 729;
4 Pomeroy Eq. Jur., (3 Ed.) Sec. 1342;
DeGray vs. Monmouth Beach Clubhouse Co., *supra;*
32 Corpus Juris, 203-207, Secs. 315-323, citing under Sec. 316;
Chevy Chase Land Co. vs. Poole, *supra.*

In the case of Spilling v. Hutcheson, 111 Va. 179, a bill in equity was filed charging a breach of a covenant containing building restrictions and praying for a mandatory injunction compelling the defendant to conform his building to the established line. Defendant denied the breach and contended that if there were a breach the plaintiff would have a full, adequate and complete remedy by action at law for damages.

Whittle, J., p. 182, in commenting upon the contention that appellant should be left to remedy at law for the breach of covenant stated:

"We do not concur in this contention * * * The correct rule in such case is clearly stated by Lord Cairns in Doherty v. Allman, 3 H. L. App. Cas. 729, as follows: 'If parties, for a valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done, and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.'

"In 4 Pomeroy's Eq. Jur. (3rd Ed.) sec. 1342, the author, in discussing the subject of 'Restrictive Covenants Creating Equitable Easements,' observes: '* * * The injunction in this case is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial. * * * It is clearly established by authority that ~~their~~ there is sufficient to justify the court in interfering, if there has been a breach of the covenant, it is not for the court but for the plaintiffs to estimate the amount of damages that arises from the injury inflicted upon them. The moment that the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it and no right to refuse to the plaintiff the specific performance of the contract, although his remedy is that which I have described, namely, an injunction.' "

CONCLUSION.

In conclusion it is respectfully submitted that the decree of the Court below should be affirmed.

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